

Exhibit 39

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION
ORACLE AMERICA, INC.,
Plaintiff,
vs. Case No. 3:10-cv-03561-WHA
GOOGLE, INC.,
Defendant.

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PURSUANT TO THE PROTECTIVE ORDER
VIDEO DEPOSITION OF JAMES MALACKOWSKI
San Francisco, California
Wednesday, March 17, 2016
Volume I

REPORTED BY:
REBECCA L. ROMANO, RPR, CSR No. 12546
JOB NO. 2265299
PAGES 1 - 385

Generally, I listed a few.

Without the report -- I don't want to go through and -- and speculate other categories, but you can find them there.

Q. What are the categories listed in your report?

A. Well, in two respects, one, they're the categories, I calculated damages specifically related to. We've listed those six grouped into four.

And there are other categories of which I've generally described and identified two.

You seem to be asking me the same question for the third or fourth time.

I don't have a recollection, sitting here, of other benefits associated with the taking that I did not ultimately calculate because I found the records not sufficient.

Q. You mentioned brand enhancement. You didn't perform any quantification of the benefits of brand enhancement created by the alleged infringement, correct?

A. Correct, which is precisely why I placed them in this category of non-quantified benefit.

Q. What's your basis for saying that there's

brand enhancement to Google not causally connected to the alleged infringement?

A. So, again, defer to my report, there's discussion there.

But I think, at a general level, the success of the Android platform, on which the -- on which they relied upon the copyrights at issue in this case, has had general carryover benefits to Google. More people became used to search, exposed to a wider search audience.

And I believe the records of this case would suggest that once people are comfortable using Google Search, perhaps introduced to them by way of the mobile environment, they are likely to extend their use of Google Search outside of the mobile environment both generally and in comparison to alternatives such as Yahoo! and Bing.

Q. What's that based on, that people extend their use of Google Search?

A. Well, my comments to you is based upon my review of the record, some of which is cited specifically in my report. I can't provide you cited documents or quotes from memory, sitting here.

Q. You can't think of any specific evidence

that you relied on that substantiates the claim that people extend their use of Google Search as a result of the infringement at issue?

A. Not specific documents. I would defer to what's listed.

Q. You also mentioned YouTube. You didn't quantify any benefit to Google as YouTube revenue stream as a result of the alleged infringement here, correct?

A. Correct.

Q. And why not?

A. I did not have the information sufficient to allow me to do so.

Q. What information would you need to perform that calculation?

A. I would start by trying to understand the percentage of YouTube ad benefits, in particular, the display ad benefits that were from mobile as opposed to other channels.

Q. And what information did you not have that you needed?

A. I don't recall information sufficient to allow me to make that distinction.

To the extent it was there, I -- I don't recall it.

Q. Are there any other revenue streams that you can think of that weren't included in your quantification of wrongful profits, but you still contend received some benefit as a result of the infringement?

A. In the two minutes since you asked me that four times before, no.

Q. What sources of information did you use in calculating the revenue amounts that are at issue for the four revenue streams you included in your quantification of alleged wrongful profits?

A. Google-specific records, as well as estimates made by Dr. Leonard in his rebuttal report.

Q. When you say Google-specific records, do you mean Google profit and loss statements?

A. It include profit and loss statements. There was reference to various management presentations, reference to 10-K and other public filings.

All of that is detailed, generally, within the report and in the schedules to the report. I think I have taken some care to specifically footnote by Bates number or by citation to publicly available records the exact

A. Correct. But it's not simply fair to imply that that 1.2 billion difference is -- is -- is the only thing that's going on. I'm also taking into account in that difference other elements of contribution that are not associated with the ad revenue. That's in the first part of my calculation, in particular the digital content and applications.

Q. Once you arrive at the 35.6 percent platform contribution, you don't apportion further, correct?

A. I am sorry. My last answer I said, digital content and apps also include hardware. So could you repeat your last question, because I was thinking about my prior answer --

Q. Once you arrive at the 35.6 percent platform contribution, you don't apportion further, correct?

A. Well, we -- "apportion" is a -- a term of art. I certainly consider further apportionment and conclude that, once I've reduced it to that level, leaving Google with 64 percent of the economic benefit, the commingling that exist as a result of the Google taking is such that I am not able to, and do not believe, it's possible to

apportion further at a revenue level.

I understand that ultimately that's Dr. Leonard's obligation, and he's presented no suitable apportionment that would address that. I -- I -- I clearly reject the lines of the code analysis for the reasons we discussed.

I do, however, take into account further costs, which some cases suggest also are a reflection of apportionment, but I don't take into account a further arithmetic explicit apportionment because of the commingling.

Q. Getting back to the technical issues, if the Android runtime were removed from Android, Android wouldn't work, correct?

A. That's a question better for a technical expert. My presumption is that it would not, but I don't have a technical opinion in that regard.

Q. And if other Android libraries were removed from Android, Android wouldn't work, correct?

A. Same answer.

Q. If there are multiple aspects of the Android that, if they were removed, would disable the operating system, how does the fact that Android wouldn't work without the SSO and declaring

code establish a causal nexus?

A. Well, we have talked about this already at great length, and to sort of recap for you:

One, I understand from my experience, including the experience with the Brocade A10 case that I cited for you, that that sort of analysis is applicable to understanding causal nexus explicitly;

Two, I understand from the technical experts that the APIs at issue in declaring code and SSO are not like everything else, that they, in fact, are relatively more important for the reasons they describe;

And, third, from a business perspective, my report is replete with extensive discussion of the need for a license to the code at issue -- I'm sorry -- there's extensive discussion in my report discussing the need for the license of what was ultimately taking, because of that unique window of opportunity, competitive threat and lack of alternatives.

Q. Mr. Malackowski, there's not any discussion in your report of a need for the license taken -- to -- to the material actually taken, the 37 APIs, the declaring code and the SSO, is there?

MS. HURST: Object to the form.

THE DEPONENT: Well, there is, in the sense that there is a need, or a recognition by Google of the need for a license and the lack of alternatives. We have discussed at great length that those documents do not specifically call out the words "37, API, declaring code," as I would expect them not to, based upon my experience in matters of this type.

MS. HURST: Can I just -- I think my LiveNote stopped working, and I just want to inquire.

MR. PURCELL: Should we go off the record? That's fine.

THE VIDEOGRAPHER: Going off the record at 10:31 a.m.

(Recess taken.)

THE VIDEOGRAPHER: Back on the record at 10:32 a.m.

Q. (By Mr. Purcell) Mr. Malackowski, I think you alluded to it in your testimony, and it's mentioned in your report, you also rely on a centrality analysis regarding the SSO and declaring code of the 37 Java SE APIs that was performed by Dr. Kemerer; is that right?

Q. So your opinion is that because the 37 APIs are commingled with the rest of the android platform, that it's appropriate to assign all the value of Google's profits attributed to the platform to those APIs, right?

A. First, if you're using 37 APIs in a very shorthand way, then I can answer that question. I presume you are, and you are not making a distinction between the APIs and the declaring code and the SSO.

So if we're just talking about the infringement, yes, I believe that the commingling of any other contributed element with the infringement, in light of the record of this case, suggests that for apportionment, before deducting expenses, that's that a proper conclusion.

Q. And how do you determine that allegedly infringing material is commingled with other material to trigger the application of the legal theory of commingling from the Sheldon case?

A. Would you repeat the question, please?

(Record read as follows:

"QUESTION: And how do you determine that allegedly infringing material is commingled with other material to

trigger the application of the legal theory of commingling from the Sheldon case?")

THE DEPONENT: So there is an entire section of my report that describes that. Particularly in my reply report, page 79. So I would refer you to that section in detail. But basically it is a fact-driven analysis that references both the technical experts as well as the business considerations. In the end concluding, quote, Under these circumstances, use of the commingling standard is appropriate because the Java APIs are properly viewed as a gating item to the Android platform, end quote.

Q. (By Mr. Purcell) And that's the reason why that the Java API is reviewed as a gating item?

A. Yes, the reasons that are provided in my report. Yes.

Q. Are there any other gating items to the Android platform other than the Java APIs?

A. There may be. That's the essence of the commingling theory, right? Because this is, A, Google's burden; and, B, specific to the notion of copying, knowingly assuming the risk, it's my understanding that it is an appropriate methodology

to determine profits using the commingling theory, as I have done.

Q. And your understanding that it's an appropriate methodology is based on what?

A. Similar to what we talked about earlier in the day. It is based on my experience in matters of this type. A. B, my review of the various authorities I cite in my report, both the cases and the treaties. C, my application of the facts of the record, including the technical expert. And, D, my confirmation of my understanding of the legal theory with counsel.

Q. If there are multiple gating items to the Android platform, how would the commingling theory handle that, given that each gating item can't being responsible for 100 percent of the profits of the platform?

A. The commingling theory would put the burden upon the infringer to determine whether or not any of the other gating items can be fairly apportioned away.

Q. That's not an analysis that you have done?

A. I tried to. I have considered that. In my opinion, there isn't evidence that's available

to do that, and in consideration of the technical and business significant of the copyrights at issue, it's not necessary.

And then I would add, third, most importantly, I do not believe that Dr. Leonard's line of code analysis even speaks to this issue and substance, but importantly is an analysis that's been rejected by courts repeatedly that there is -- it is not an accepted approach to use a line of code apportionment because that only considers a quantitative metric, and it ignores the qualitative value. In the cases -- in my experience, very specifically rebut that, and I point you to most -- most directly related to me, again, Judge Grewal, who discussed that issue very specifically in the Brocade case.

Q. What did you do -- what did you do in your attempt to apportion the various components of the Android platform?

A. I attempt to understand the technical significance of the copyrights vis-a-vis the other elements of the platform. I sought to understand any theory advanced by defendants, and then I reconciled that with my review of the business conditions.

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1 tables that show what the 37 APIs at issue do
2 versus others. But that's really a technical
3 discussion, and from memory I -- I couldn't
4 describe that difference to you. I would defer to
5 the technical experts.

6 Q. And, in fact, all of the implementing
7 code in the Android core libraries, that's not
8 accused of infringement?

9 A. As we discussed before lunch, true.

10 Q. And that made a contribution to the
11 functioning -- strike that.

12 That made a contribution to the profits
13 that Google earned from Android, didn't it?

14 A. Sure.

15 Q. And you haven't made any attempt to
16 quantify that?

17 A. Well, I have, because I have made an
18 attempt to address the commingling factor. There
19 is not evidence, in my opinion, that would allow
20 you to do a second or third level apportionment in
21 recognizing that it is defendants' burden.

22 I considered the apportionment metric put
23 forth by the defendants, i.e., lines of code, and
24 was able to reject that out of hand because of the
25 decisions of multiple courts and the basis for

1 those decisions.

2 Q. You haven't attempted to independently
3 quantify the value or the contribution of the
4 implementing code in the Android core libraries to
5 Android's profit, correct?

6 A. True. That was not my assignment, and I
7 have not quantified that. I have sought
8 information in that regard as it -- a great --
9 relates to the commingling issue. I'm not aware of
10 any.

11 Q. What information have you sought that
12 would allow you to separately value the
13 contribution of the implementing code in the
14 Android core libraries to Google's Android-related
15 profits?

16 A. Most specifically information in the
17 Dr. Leonard report or the technical expert reports
18 of defendants. Generally where they would seek to
19 meet their burden by putting forth evidence of
20 apportionment to address commingling.

21 Q. What information have you personally
22 sought on that issue?

23 A. My review of the reports.

24 Q. Did you ask any of Oracle's technical
25 experts to analyze that issue?

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1 A. No, I did not.

2 Q. How would one go about analyzing that
3 issue? If you wanted to do a second or third level
4 apportionment, what you would -- what you would
5 want to see?

6 A. At that level, which is based upon our
7 conversation, which is a technical level, that's
8 outside the core of my area of expertise. I would
9 seek the counsel of the technical experts.

10 Q. What information would you, as a damages
11 quantifier, find persuasive in order to enable you
12 to do a second level apportionment between all the
13 implementing code in the Android core libraries and
14 the structure, sequence, and organization, on the
15 other hand, of 37 API packages?

16 MS. HURST: Object to the form.

17 THE DEPONENT: To the extent that there
18 was a detailed technical analysis that was
19 confirmed by the business records of the case,
20 that's the type of information I would find
21 persuasive. I can't tell you that I would find it
22 persuasive per se, because we're speaking
23 hypothetically, but that's the type of thing that I
24 would look to.

25 Q. (By Mr. Purcell) What type of detailed

1 technical analysis would you be looking for?

2 A. Technical expert reports.

3 Q. Analyzing what?

4 A. Analyzing the contributions on a
5 quantitative way of the copyrights at issue versus
6 the other technical elements that contribute to
7 profits seeking to tie those contributions back to
8 the business records.

9 Q. You don't have any specific technical
10 analysis in mind that would be able to unpack the
11 value of the implementing code in the Android core
12 libraries versus the value of the structure,
13 sequence, and organization of the 37 Java SE API
14 packages; is that right?

15 A. Correct.

16 Q. And you understand, similarly, the
17 Android operating system contains an Android
18 runtime?

19 A. Yes.

20 Q. Do you have an understanding of what the
21 Android runtime does?

22 A. Not from a technical perspective, no.

23 Q. Do you understand how important the
24 Android runtime is to the function of the Android
25 operating system?

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profits.

Q. You might even call the presence of the phone functionality on a mobile phone a gating item, correct?

A. On a mobile phone generally? Sure.

Q. You also understand that Google's strategy to -- well, strike that. Let me finish up the last line of questions.

You haven't made any effort to separately quantify the contribution to Google's Android-related profits of the preinstalled applications on the Android platform, correct?

A. You have asked me this question repeatedly about each and every element you've raised. And, yes, I sought to understand the contributions that were made to the profits of Android. I determined that that could first be measured by focusing on the platform-related economics. And then I sought to specifically see if there could be a second level apportionment, aside from cost deductions, that would allow me to distinguish between the copyrights at issue and any other element and concluded that, because of the commingling, there was not data sufficient for me to do so.

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I then looked to see if Dr. Leonard, consistent with his obligations, provided me a route to solve that problem and concluded that he did not.

And so, in my opinion, the best available evidence of apportionment is what I've set forth in my report at the level set forth in my report.

Q. You also understand that Google's strategy to release Android as an open source platform was crucial to the success of the platform, correct?

A. I -- I don't believe I draw that opinion in my report. And I specifically talk about the implications of certain characteristics of open source platforms at various points in time. So your question would have to be more specific.

Q. Sure. Why don't you take look at paragraph 58 of your responsive report on page 18.

So in the third sentence of that paragraph you write, "Additionally, it suggests Apple's closed environment would have monopolized the smartphone market which ignores the success that resulted from Android's free open source model."

Do you see that?

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A. I do.

Q. So at least some part of the success of Android and Google's Android-related profits are a result of the free open source model that Google released Android under, correct?

A. Well, certainly that is an element of their business model. I don't know as -- I thought your last question implied that there's an incremental contribution of that. I would note that this discussion we are referring to is specifically in response to the Kim and Berry models. So a critique of Dr. Leonard's use of those, not a general discussion of apportionment.

Q. Nonetheless, Google's strategy to release Android as an open source platform did make a significant contribution to Android's success, didn't it?

A. I don't believe I use the word "significant" or draw that relative qualitative assessment in my report.

Q. Do you have any opinion on the extent to which Android would have succeeded had it not been open sourced?

A. Well, to the extent that it was a platform that included a license from Java with the

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related elements of control and security, I think it would have been as successful.

Q. And what's that based on?

A. Based upon that that was a focus of the discussions early on between Android and Google. That clearly -- I'm sorry. Between Google and Android and Sun. That clearly it was Sun's expectation that a license consistent with their usual practice would allow Google to be successful.

Q. So your testimony is that if Android had not been open sourced, it would have been just as successful?

A. Again, I don't draw that opinion in my report. I'm merely answering your questions in response to this deposition. That's outside the scope of my analysis, in large part because, again, it trespasses into the world of the counterfactual, which I do not believe to be relevant.

Q. In any event, you made no attempt to qualify the contribution to Google's Android-related profits of the open source strategy; is that right?

A. I don't make a specific quantification of that contribution. I don't believe that that's possible.

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